Supreme Court, U.S.
FILED
FEB 11 2000
CLERK

(3)

No. 99- 677

IN THE

Supreme Court of the United States

Waterview Management Company,
Petitioner,

v.

Federal Deposit Insurance Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER WATERVIEW MANAGEMENT COMPANY'S REPLY TO FEDERAL DEPOSIT INSURANCE CORPORATION'S BRIEF IN OPPOSITION

James T. Lewis
Counsel of Record
JAMES T. LEWIS, P.C.
1433 Dolley Madison Boulevard
McLean, VA 22101
(703) 847- 9665

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

13pp

TABLE OF CONTENTS

Page[s]

ISSUES 1

I. FACTS 1

II. ARGUMENT 2

A. WMC should be allowed to recover for damages to the Beltway tract 2

1. As to due process issues.....2

2. As to the timing of the repudiation 6

B. The deduction issues

III. CONCLUSION 7

A. WMC is entitled to recover for the damages on the Beltway tract 7

B. The deductions from appraised value are based upon an erroneous assumption and should not be allowed 7

C. The FDIC brief perpetuates the lack of fairness in these judicial proceedings and is inconsistent with fundamental rights 9

TABLE OF AUTHORITIES

Cases: **Pages**

Dandridge v. *Williams*, 397 U. S. 471, 476 n. 6 (1970) 5

Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U.S. 479 (1975) 1, 4, 6

Morley Co. v. Maryland Cas. Co., 300 U.S. 185 (1937) 4, 5

Office and Professional Employees Int'l Union v. F.D.I.C., 27 F.3d 598 (D.C. Cir. 1994) 6

Olson v. United States, 292 U.S. 246 (1934) 1, 7, 9

Schweiker v. Hogan, 457 U.S. 569 (1982) 4

Thigpen v. Roberts, 468 U.S. 27 (1984) 4

United States v. 8.41 Acres of Land, Situated in Orange County, State of Texas, 680 F.1d 388 (5th Cir. 1982) ..... 1, 2, 3 ,8

United States v. American Ry. Exp. Co., 265 U.S. 425, 435 (1924) 4, 5

Waterview Management Company v. Resolution Trust Corporation, 105 F.3d 696, 701 (D.C. Cir. 1997) 3, 4

Statutes and Rules:

12 U.S.C. 1821(e)(8) 3

12 U.S.C. 1821(e)(3)(A)(i) 6

PETITIONER WATERVIEW MANAGEMENT COMPANY'S REPLY TO FEDERAL DEPOSIT INSURANCE CORPORATION'S BRIEF IN OPPOSITION

ISSUES

1. Are the rights of Appellant, hereafter WMC, to due process and trial by jury violated when: (a) it does not receive a hearing by the trier of fact as to unity of ownership, as the 5th Circuit held in the case of *United States v. 8.41 Acres of Land, Situated in Orange County, State of Texas,* 680 F.2d 388 (5th Cir. 1982); (b) the Appeals Court affirms, without remand as required in *Massachusetts Mutual Life Ins. Co. v. Lugwig*, 426 U.S. 479 (1975), on a new basis that was not even at issue in the lower court; (c) a determinative issue, such as successor in interest, that has been argued repeatedly with supporting authorities by WMC, simply is ignored; and (d) a distinction is made by Defendant, hereafter FDIC, for a lesser remedy where property is taken by the government pursuant to an act of Congress, than where property is taken by the government pursuant to the U.S. Constitution?

2. Are assumptions for an appraisal of value valid when the subjective facts and circumstances of the property owner, whose property is taken, expressly are not considered, in violation of *Olson v. United States*, 292 U.S. 246; but instead, such assumptions are based upon hypothetical facts that are inapposite to those of the case?

3. Should this Court review judicial proceedings that tolerate and engender repeated violations of Constitutional rights as in this case?

I. FACTS

The material facts are not in dispute with two important exceptions.

A. The FDIC brief repeatedly states that "some of the principals" of the two entities – WMC and PortAmerica Associates - were the same. In fact, *all* of the principals were the same in both entities.

B. Facts regarding the allocation of deductions between the Beltway tract and the riverfront tract continue to be misrepresented by the FDIC. WMC already had allocated the costs and revenues between these two tracts in its pro formas for the development for the project. This had been done years before the litigation. However, for purposes of this litigation the attorney for the FDIC directed the appraiser to assume the parties would not be cooperative. On that basis, the appraiser arbitrarily charged expenses that already had been allocated to the Beltway tract to be charged, instead, against the riverfront tract. It is manifestly unfair and inconsistent to allow deduction, from the appraised value of the riverfront tract, of expenses allocated to the Beltway tract while not allowing the revenues from the Beltway tract which would have absorbed them.

The issues, other than the above mistakes of fact, involve the erroneous interpretation of law and its application to the facts of this case.

II. ARGUMENT

A. WMC should be allowed to recover for damages to the Beltway tract

1. As to due process issues:

The FDIC states at pages 5 and 6 of its Brief in Opposition that the holding in this case by the Court of Appeals for District of Columbia Circuit was not in conflict with the 5th Circuit case of *United States v. 8.41 Acres of Land*, *supra*, which held that due process required a hearing on the issue of unity of ownership. The FDIC argues that

WMC did have a hearing when the district court judge ruled that WMC was not entitled to recover for damages to the Beltway tract and therefore was not entitled to a jury trial on the amount of these damages. The FDIC sums up its argument at page 6 by asserting that this issue of unity of ownership is "a question of law" and that WMC had received the hearing that the 5th Circuit had contemplated when it held that due process required a hearing. This was clearly erroneous. The FDIC needed only to look as far as the headnote 4 at 680 F.2d, p. 389:

> When applicable, issue of unity or separateness of tracts separated by condemnation is a question of fact to be presented to the *trier of fact* (emphasis added).

The significance of this law is recited in headnote 19 at p. 390:

> In exercise of power of eminent domain, due process requires that owners be given an opportunity to be heard on issue of compensation.

The present case is not one of eminent domain. But the principles to be applied should be the same. The issue with the Beltway tract is that of damage to the remainder after a part of the whole has been taken. The FDIC brief at page 5, however, further seeks to distinguish *United States v. 8.41 Acres of Land, supra*, on the following basis: "That case involved the calculation of constitutionally mandated just compensation for a taking by the government, not the determination of statutory repudiation damages under 12 U.S.C. 1821(e)(8)." This statutory construction is manifestly erroneous. Among many other authorities, the District of Columbia Circuit Court found in the first WMC case, *Waterview Management Company v. Resolution Trust Corporation*, 105 F 3rd 696, 701 (D.C. Cir.1997), that failure to compensate for losses caused by the repudiation of the option would be tantamount to a taking and that "... statutes should be construed to avoid a possible unconstitutional

result." There was nothing in that decision that limited the recovery of damages to just the riverfront tract.

The FDIC simply ignores, as the Court of Appeals had done, the admitted fact that WMC was a successor in interest to PortAmerica Associates[1], with options on both tracts at the time of repudiation, and when the suit was filed in September, 1994. That succession of interest should have resolved this issue of "different entities." The RTC had recognized this fact at the District Court, which explains why the different entities argument was not even an issue in the lower court.[2]

The FDIC seeks to justify the action of the Court of Appeals in completely changing the basis of the holding below - while not even addressing the rationale of the lower court - by erroneously interpreting the two cited cases of *Thigpen v. Roberts*, 468 U.S. 27 (1984) and *Schweiker v. Hogan*, 457 U.S.569 (1982). These cases do not hold that "an appellate court, however, may affirm a lower court judgment on any ground supported by the law and the record." The law is expressed comprehensively in *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1975) which states.

> The Court of Appeals' decision on this issue is plainly at odds with the "inveterate and certain" rule, *Morley Co.* v. *Maryland Cas. Co.*, 300 U. S. 185, 191 (1937), of *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924), where a unanimous Court said:

---

[1] FDIC appellate reply brief in first *Waterview* appeal stated: "Waterview has acted on behalf of PortAmerica Associates in their negotiations with the RTC and, for all practical purposes, represents the *de facto* appellant in this case." FDIC appellate reply brief, p. 9 acknowledges: "PortAmerica was to be developed by WMC's predecessor in interest, PortAmerica Associates..."

[2] FDIC responsive brief at the Distrct Court, p. 9, acknowledged: "Waterview had an option on the Beltway Tract with Signet Bank of Maryland as well as the option pursuant to the HomeFed Agreement..."

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." (Footnote omitted.)

The argument of the insurer before the Court of Appeals that Illinois, not Michigan, substantive law applied was no more than "an attack upon the reasoning of the lower court," and as such required no cross-appeal.

Because the Court of Appeals did "not reach the issue nor express any opinion on the effect of the tort claim conflicts of law doctrine" of Illinois, 524 F. 2d, at 379 n. 1, we think it "appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge* v. *Williams,* 397 U. S. 471, 476 n. 6 (1970). Accordingly, the petition for writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings in conformity with this opinion.

As in *Mass. Mutual,* this case should have been remanded to the district court for determination of the issue of unity of ownership because the lower court "... did not reach the issue nor express any opinion ..." on that issue. One way or the other, WMC is entitled to a hearing on this issue.

2. As to the timing of the repudiation:

The July 6, 1992 date was purely fictional as the date of repudiation. The Circuit Court found in its first *Waterview* case, *supra,* that the act of repudiation was the breach of the exclusive marketing agreement in the 1993 winter/spring catalog. By that time, WMC also held the option on the Beltway tract.

The FDIC argues at page 9 that even if the act of repudiation occurred after WMC acquired the option on the Beltway tract, WMC nevertheless should have been on notice that the RTC could repudiate later and such repudiation would relate back Such spurious reasoning cannot be the law; if that were so, virtually all business by a company which had contracts with that institution would have to stop for fear that the RTC relation back feature could obliterate any business events after the theoretical date when the receiver was appointed. That ludicrous result is the very reason why the actual - not the theoretical – date should apply.

The FDIC erroneously interprets the case of *Office and Professional Employees Int'l Union v. F.D.I.C.*, 27 F.3d 598 (D.C. Cir. 1994) when it relates the time of the repudiation back to the date when the RTC Conservator was appointed, under 12 U.S.C.1821(e)(3)(A)(i). In that case, bank employees were allowed to recover severance pay even though the contract had not been repudiated as of the date of severance. The Circuit Court held at page 602 that "such questions, however, deal not with *whether* appellants have a claim, but rather with *how much* the claim is worth..." Thus, in this case the date of the appointment of the conservator should not determine whether WMC has a claim, but rather how much that claim is worth. WMC held the option on the

Beltway tract at the time of the date of the repudiation so that the entities were at that time exactly the same (WMC did *price* its claims as of the date of the appointment of the conservator).

B. The deduction issues

The FDIC argument, at pages 7 and 8 of its brief, that *Olson v. United States*, *supra*, holds that the test for assumptions in real estate values must be *objective* is just the opposite of what that case holds. This Court applied *subjective* tests in arriving at its decision in *Olson.* It found that it was *possible* that Mr. Olson could have used his land, that was taken, for a reservoir but not *probable*, and then found that mere possibility would not justify compensation for loss of a reservoir. If, however, Olson had owned a sufficient amount of the land to establish the *probability* of its claimed use, then the Court would have found that he could have been compensated for the loss of that use. *Olson* was the classic case of a subjective determination. If the same subjective test is properly applied in the present case, WMC would, prevail, as, subjectively, since the principals of the two entities were the same. It is an absurdity to assume that someone would not cooperate with himself.

Insofar as the FDIC argument that the jury considered both appraisals, the judge in the lower court - in the presence of the jury - overruled an objection by WMC's attorney, thus confirming the FDIC's assertion – in the presence of the jury – that the assumption of uncooperative parties was in response to a direct court ruling.

III. CONCLUSION

A. WMC is entitled to recover for the damages on the Beltway tract.

The threshold issues are those of due process and rights to a trial by jury:

1) The 5th Circuit in the case of *United States v. 8.41 Acres of Land*, *supra*, clearly holds that due process does require a hearing as to unification of ownership by the *trier of fact*, not a hearing of law that may be decided by the court;

2) The Court of Appeals erred when it affirmed on a basis that was never addressed in the lower court and this new issue should remanded for trial;

3) The FDIC brief errs in its argument that a party is entitled only to some lesser remedy when its property is taken pursuant to an Act of Congress rather than pursuant to the U.S. Constitution.

The Court of Appeals nevertheless found that WMC was not entitled to recover damages on the Beltway tract on the basis that different entities owned the two tracts. In order to decide this issue without a hearing, the following errors were committed in addition to the due process errors above:

1) the FDIC brief erroneously states that "some of the principals were the same." The fact is that *all* the principals were the same in these two entities;

2) a fictional date that the contract was repudiated was applied on the basis of an erroneous interpretation of FIRREA instead of the actual date of the repudiation when WMC had the option to purchase both tracts; and

3) the Court of Appeals, and now the FDIC brief, simply ignored the facts, admitted in the FDIC briefs, that at the time the Complaint was filed WMC was the successor in interest to PortAmerica Associates.

B. The deductions from appraised value are based upon an erroneous assumption and should not be allowed.

The appraisal issue raises the broad principal as to whether the proper assumption for determining property value is to be subjective or objective. Under a "subjective" assumption, it is necessary to consider the circumstances of the property owner whose property is being taken; it is

irrelevant whether through eminent domain or through the repudiation of a contract. With an "objective" assumption, as in the FDIC formula, considerations relate to a hypothetical seller and buyer without regard to the particular circumstances of the actual owner. The Court of Appeals said WMC's standard was "too subjective." WMC does not understand how a matter of degree enters the equation. WMC's position is that the test must be subjective:

1) The intent of the underlying statute - FIRREA - is to "make the party whole" whose property has been taken;

2) The case law, as discussed in *Olson*, *supra* clearly requires a subjective test;

3) There was a term in the Comprehensive Settlement Agreement that expressly required the parties, i.e. WMC, PortAmerica Associates and HomeFed bank to cooperate in the development of the property. Therefore, it must be assumed that the parties would cooperate, as agreed, and thus the assumption supporting the FDIC deductions from appraisal were not valid. If the RTC's repudiation is considered to have abrogated that term as of the fictional date when the conservator was appointed, then it is the RTC who should bear the responsibility for the alleged "non cooperation" instead of charging it to WMC through a contradictory assumption.

It follows that if a subjective test is appropriate, then it is an absurdity to say that the owner of the Beltway tract would not cooperate with the owner of the riverfront tract. The principals were all the same.

C. The FDIC brief perpetuates the lack of fairness in these judicial proceedings and is inconsistent with fundamental rights.

The FDIC response unfortunately is a perpetuation of the unjust treatment that WMC has suffered through the judicial process. The cases are not analyzed accurately and results are reached that are inconsistent with principles that have been

established for years by this Court. If the rationale as advocated by the FDIC were adopted, it would have a material and detrimental effect on all cases where the government has taken part of the whole, without regard to the property owner's damages to the remainder. Such an unjust result has been reached through a judicial process that has not given this case fair and thorough consideration, but rather has dismissed fundamental Constitutional issues of due process and trial by jury with a brief memorandum opinion, with no authorities, and which determines the outcome on a basis not even raised in the lower court. Finally, the issue of successor in interest, which should determine the issue favorably to WMC, simply was ignored at the Court of Appeals level and by the FDIC in its response.

The Petition for a writ of certiorari should be granted.

Respectfully submitted.

James T. Lewis
Counsel of Record
James T. Lewis, P.C.
1433 Dolley Madison
Boulevard
McLean, VA 22101
(703) 847-9665

February 11, 2000